Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications,	)	
Inc., for Forbearance Under 47 U.S.C.	)	CC Docket No. 03-220
160(c) From Application of Sections	)	
251(c)(3), (4), and (6) in New-Build,	)	
Multi-Premises Developments	)	
	)	

OPPOSITION OF COVAD COMMUNICATIONS TO BELLSOUTH TELECOMMUNICATIONS, INC., PETITION FOR FORBEARANCE

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SUMMARY

Covad Communications, by its attorneys, herewith respectfully submits its opposition to the petition of BellSouth Telecommunications, Inc., for forbearance from unbundling requirements set forth in the Commission's *Triennial Review Order*.[1] In its Petition, BellSouth seeks forbearance from applying sections 251(c)(3) (access to UNEs), 251(c)(4) (resale) and 251(c)(6) (collocation) to BellSouth facilities used exclusively to serve New-Build, Multi-Premise Developments (MPDs) and the services provided over such facilities to the end users located in such developments.[2]

The Commission's decision to exempt mass market fiber-to-the-home (FTTH) deployments from unbundling requirements reflected the Commission's attempt to carefully draw a balance between the Commission's stated goals of spurring next-generation facilities investment by incumbent LECs and allowing competitors access to last-mile transmission facilities. Unfortunately, in the *Triennial Review Order*, the Commission chose to grant incumbent LECs even further relief than allowing them to monopolize true FTTH deployments, by declining to allow competitors access to the broadband transmission capabilities of FTTH deployments in overbuild, or "brownfield," situations, and even declining to allow competitors access to the broadband transmission capabilities of hybrid fiber-copper loops. The Commission's *Triennial Review Order* has already gone too far in allowing incumbents to monopolize critical last-mile broadband transmission facilities.

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[1] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 03-36 (rel. Aug. 21, 2003) ("*Triennial Review Order*").

[2] BellSouth Petition at 1.

Nonetheless, the Commission's *Triennial Review Order* at least had the virtue of drawing a narrow, bright-line test for where such monopolization would be allowed. The BellSouth forbearance petition would upset that balance, blurring the line between deregulated FTTH deployments and any loop deployment to MPDs – again, leading further down the slippery slope towards remonopolization of the last-mile transmission facilities critical to the delivery of broadband services. As in its earlier fiber-to-the-curb proposal, BellSouth seeks to remake the limited, narrow unbundling relief the Commission provided for FTTH loops into an exception that swallows the rule – by sweeping in all facilities to all so-called new-build, multipremise developments.

Covad urges the Commission to reject BellSouth's demands for even further deregulation beyond the wide-ranging exemptions from unbundling requirements already granted in the *Triennial Review Order*. In the alternative, if the Commission decides nonetheless to proceed with providing BellSouth additional deregulation for new-build, multipremise development deployments, the Commission must adopt the necessary limitations to narrowly tailor this deregulation to its stated goals. Otherwise, in the name of limited relief for new-build MPD loops, the Commission risks fully remonopolizing the critical last-mile transmission facilities on which mass market consumers and enterprise customers depend for competitive broadband services.

I. Introduction

Covad is the leading nationwide provider of broadband connectivity using digital subscriber line (DSL) technology. Covad's nationwide facilities-based broadband network reaches nearly 45% of the nation's homes and businesses. As a facilities-based provider, Covad relies on ILECs to provide unbundled transmission facilities (loops and

interoffice transport) and the operations support systems (OSS) necessary to facilitate ordering and provisioning of such facilities. In addition, in order to connect customers to its network, Covad is collocated in hundreds of central offices throughout the nation. Furthermore, as a facilities-based provider of broadband services in both the mass market and enterprise markets, Covad is uniquely affected by BellSouth's requests for further deregulation of last-mile transmission facilities used to provide mass market and enterprise broadband services.

BellSouth argues that the Commission should expand the vast deregulation for broadband transmission facilities already provided in the Commission's *Triennial Review Order*. Lest the incumbents forget, however, in that order the Commission already provided wide exemptions from unbundling requirements for last-mile transmission facilities used to provide mass market broadband services. The Commission completely exempted incumbent LECs from providing access to the packetized broadband transmission capabilities of hybrid fiber-copper loops as UNEs.[3] The Commission completely exempted incumbent LECs from providing access to the broadband transmission capabilities of fiber-to-the-home loops as UNEs, in both new-build and overbuild situations.[4] Furthermore, the Commission eliminated even its limited existing UNE rules for packet-switching,[5] and limited competitors to accessing broadband transmission facilities in the enterprise market with legacy TDM-based interfaces.[6] Finally, the Commission even decided to phase out and ultimately eliminate the most

[3] *See Triennial Review Order* at paras. 285-297.

[4] *See Triennial Review Order* at paras. 273-284.

[5] *See Triennial Review Order* at paras. 535-541.

[6] *See Triennial Review Order* at paras. 298-342.

widely deployed means of providing competitive broadband services in the mass market, namely the UNE high frequency portion of the loop.[7] By eliminating the line sharing UNE, the Commission decided to allow the incumbent LECs to *remonopolize* mass market broadband services for which competition had proven to be wildly successful. In sum, the Commission's *Triennial Review Order* already provides the incumbent LECs with a staggering amount of deregulation – for both mass market and enterprise loop facilities. Yet, despite winning such staggering deregulation of critical last-mile transmission facilities, BellSouth arrives at the Commission (again) asking for even more deregulation.

II. Enterprise Customers Are Typically Located in Multiunit Premises

BellSouth would have the Commission deregulate new-build loop deployments to multipremise developments. Yet, upon closer analysis, "multipremise developments" turns out to be a shoddy substitute for true mass market customer locations – because it is a rubric designed to sweep in enterprise customer locations. In fact, as the Commission recognized in the *Triennial Review Order*, "enterprise customers are more concentrated in urban locations, in *multiunit premises*, and demand greater variety and higher quality services than mass market customers."[8] Thus, the Commission must be exceedingly careful that any additional deregulation it grants to BellSouth does not inadvertently sweep in deregulation of facilities used to serve enterprise customer locations, all in the name of promoting mass market unbundling relief.

Indeed, BellSouth's expansive definition of "new-build" MPDs carefully sweeps in several categories of enterprise customer locations. Specifically, BellSouth includes in

[7] *See Triennial Review Order* at paras. 255-269.

its definition of new-build MPDs "multi-tenant commercial buildings, mixed use developments, malls, industrial parks and other similar developments."[9] In doing so, BellSouth invokes the deployment incentives cited by the Commission to spur mass market advanced services deployment in order to obtain unbundling relief in the more lucrative enterprise market. The Commission must not allow BellSouth to upset the already too-lenient balance the Commission struck in favor of incumbent monopolization of critical last-mile broadband transmission facilities, by eliminating even the limited competitor access maintained for facilities used to serve the enterprise market.

III. The Commission Must Not Open Up a "Backdoor" Way out of Unbundling Requirements, which Are Not "Fully Implemented"

BellSouth's current petition, unlike its earlier petition for deregulation of FTTC lopos, concedes that section 271 requirements will continue to apply to the new-build, MPD loops at issue here.[10] BellSouth states, "those MPD network elements that the Commission removes from section 251 unbundling requirements … would continue to be subject to the requirements of section 271."[11] The Commission must take BellSouth at its word, and continue to apply section 271 unbundling requirements to the network facilities at issue in BellSouth's instant petition.

The Commission's *Triennial Review Order* explicitly analyzes fiber loops, including FTTH loops and hybrid fiber-copper loops, in its review of mass market local loop unbundling obligations.[12] These facilities are, therefore, clearly "local loop

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[8] *See Triennial Review Order* at para. 326.

[9] *See* BellSouth Petition at 2.

[10] *See* BellSouth Petition at 9.

[11] *Id.*

[12] *See Triennial Review Order* at paras. 273-284 and 285-297.

transmission" facilities subject to section 271 checklist requirements.[13] The Commission's *Triennial Review Order* has already conclusively addressed the issue of the overlap and interplay between section 251 and section 271 unbundling obligations:

> [W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.[14]
>
> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[15]

Thus, there is no question that, regardless of the Commission's analysis of competitor impairment and corresponding unbundling obligations under section 251 for *incumbent LECs*, a Bell Company retains an independent statutory obligation under section 271 of the Act to provide competitors with unbundled access to the network elements listed in the section 271 checklist.[16] Moreover, there is no question that these obligations include the provision of unbundled access to loops under checklist item #4:

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling, without mentioning section 251.[17]

Unfortunately, despite BellSouth's concession of section 271 applicability, BellSouth's petition nonetheless opens a "backdoor" way out of these unbundling obligations. Specifically, section 10(d) of the Act prohibits Commission forbearance from the requirements of section 251(c) until the requirements of section 251(c) and

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[13] 47 U.S.C. § 271(c)(2)(B)(iv) (Section 271 Checklist Item #4).

[14] *See Triennial Review Order*, para. 653.

[15] *See Triennial Review Order*, para. 655.

[16] *See* 47 U.S.C. § 271(c)(2)(B).

[17] *See Triennial Review Order*, para. 654.

section 271 have been "fully implemented." As the Commission has already stated, "Under section 10(d), the Commission may not forbear … unless it determines that those requirements are 'fully implemented.'"[18] BellSouth's petition does not even attempt to make this exacting showing. Therefore, given the stark lack of evidentiary and legal support for forbearance, and the fact that BellSouth concedes here that section 271 will continue to apply, the Commission should not open up a "backdoor" out from section 10(d)'s requirements by granting the relief BellSouth seeks here.

IV. The Standard For Forbearance Has Not Been Met

Furthermore, BellSouth's petition must fail on the simple ground that the standard for forbearance has not been met. Enforcement of sections 251(c)(3), (4) and (6) is necessary to ensure that rates and practices are just and reasonable, and not unjustly or unreasonably discriminatory. Enforcement of these statutory requirements is necessary to ensure that consumers are protected. Finally, granting of BellSouth's petition will hinder, rather than serve, the public interest.

Contrary to BellSouth's assertions, BellSouth and its competitors do not face the same set of impairments in providing service to new-build, MPD developments. Rather, it is the enforcement of BellSouth's unbundling obligations that is necessary to ensure that BellSouth and competitive providers are on a level playing field. Unlike BellSouth, competitive providers do not have access to the advantages of their own legacy network, paid for and constructed with over a hundred years of rate of return financing from a captive ratebase. Even in so-called "new-build" situations, BellSouth can take advantage of its existing ducts, conduits, rights of way, and any existing subloop facilities it chooses

[18] *See Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, Memorandum Opinion and

not to replace or partially replace. BellSouth's petition makes this clear, in its characterization of what "new-build" really means: new-build includes most developments, so long as the "telecommunications infrastructure" in those developments is considered "new construction."[19] Yet, under this definition, a new commercial building would be considered a deregulated new-build MPD simply because the inside wiring had been replaced. BellSouth's expansive definition of new-build MPDs makes no reference to BellSouth's unique, inherent advantages as possessor of the most extensive telecommunications network infrastructure traversing its 9-state region. Furthermore, this expansive definition would leave BellSouth free to use all the advantages of its legacy network to serve so-called "new-build" developments, leaving it with an overwhelming competitive advantage over its competitors in installing facilities to provide service to such locations.

If the Commission grants BellSouth's petition, it can be sure that it will turn the tables on providers currently competing with BellSouth to install facilities and provide services to MPDs. BellSouth will quickly become the dominant provider of such services, free to use its legacy monopoly power to outbid and oust competitors providing service to such locations. The inevitable result will be less competition, less choice, and ultimately higher prices and less innovation for the consumer. Given this inevitable outcome, BellSouth's petition fails to meet the standards for forbearance.

V. Any MPD Loop Relief Must Be Appropriately, Narrowly Limited

For the reasons given above, Covad believes that BellSouth has not provided sufficient support for the Commission to grant its forbearance request. Accordingly, the

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Order, CC Docket No. 96-149, FCC 03-271, para. 5 (rel. Nov. 4, 2003).

Commission should immediately deny BellSouth's petition. If the Commission decides nonetheless to proceed with granting some form of MPD loop unbundling relief, the Commission should be very clear in identifying a narrow set of clearly defined circumstances in which such deregulation would apply.

a. Any Additional Deregulation Must Be Limited to Truly Greenfield, Mass Market Deployments

BellSouth claims that it requires additional relief for MPD loops because of the need to incent additional advanced network facilities deployment in the mass market. Furthermore, BellSouth claims that CLECs face the same set of impairments as incumbent LECs in making such deployments in the mass market. Accordingly, the Commission should adopt conditions designed to ensure that any additional MPD loop relief is truly limited to mass market, greenfield deployments.

The Commission should reject outright the aspects of the BellSouth's proposal that would sweep in enterprise customer locations. Thus, MPD loop deregulation cannot simply turn on whether the deployment is to a multiunit premises. The Commission should also limit any additional MPD relief to previously unserved customers in truly greenfield situations, *i.e.,* where the incumbent LEC retains no advantages of its legacy network (for example, access to existing rights of way, conduits, ducts, fiber or copper, for any portion of the loop).

In addition, the Commission should prevent incumbent LECs from unilaterally determining whether or not a particular loop facility qualifies for the additional deregulation it provides. Rather, consistent with the Commission's determinations for other unbundled network elements, the state commissions should conduct the necessary

[19] *See* BellSouth Petition at 2.

fact-finding to determine whether or not a particular loop deployment meets the incumbent LEC's claims for additional deregulation as a mass market, greenfield MPD loop deployment. Specifically, state commissions must determine whether or not the customer location served by a particular MPD loop deployment is truly a mass market customer, as opposed to an enterprise customer location. The state commission must also determine whether or not the incumbent LEC's loop deployment to that location was truly a greenfield deployment, in which the incumbent retained no advantages from its existing legacy network in whole or in part over competitive LECs to serve that particular location. In addition, the Commission should make clear that the burden of proof is on the incumbent LEC to establish that a particular loop facility qualifies for deregulation as an new-build, MPD loop.

b. Any MPD Deregulation Should Adopt Clear Technical Parameters for Qualifying Loops and the Services Provided Over Those Loops

Similarly, the Commission should not allow incumbent LECs to use additional MPD loop deregulation to blur the line between deregulated new-build, MPD loops and hybrid fiber-copper loops, which do not qualify for such deregulation. Accordingly, the Commission should adopt clear, rigid technical standards for the loops that qualify for deregulation as new-build MPD loop facilities comprised of "advanced communications infrastructure."[20] Specifically, the Commission should require that MPD loops be deregulated only where (1) the copper subloop segment of the loop actually falls below 500 feet in length;[21] (2) the loop actually delivers the same level of bandwidth to individual customer locations as a full FTTH loop, according to industry standards

[20] *See* BellSouth Petition at 4.

[21] *See* BellSouth Fiber-To-The-Curb Petition at 2.

currently in place; AND (3) that a particular loop deployment is capable of and actually offered to customers as delivering the "triple play" of services BellSouth promises its forbearance petition will deliver, namely voice services, data services, Internet services and multichannel digital video services comparable to commonly available intermodal multichannel video services (*e.g.,* via cable and satellite television).[22] The third requirement is particularly important to ensure that incumbent LECs do not blur the line between MPD loops truly serving mass market customers (and therefore delivering mass market services such as multichannel video) with high capacity loops serving enterprise customers.

Again, to ensure that the incumbent LECs cannot unilaterally simply claim that a particular MPD loop deployment meets these criteria, the state commissions should conduct the fact-finding necessary to establish conclusively whether or not these technical parameters are met by a particular MPD loop deployment. Similarly, the burden of proof should be on the incumbent LEC to establish that a particular MPD loop deployment individually meets these technical parameters.

VI. Conclusion

The Commission's *Triennial Review Order* already grants the incumbent LECs wide-ranging, staggering deregulation for their facilities used to provide broadband services. Particularly in the mass market, incumbent LECs have been relieved of just about every requirement to provide UNE access to broadband transmission facilities already; in the mass market, competitors do not retain access to the broadband

[22] *See* BellSouth Petition at 3.

transmission capabilities of FTTH, hybrid fiber-copper loops, or even line sharing. Accordingly, there is no basis here for granting even more mass market relief to the incumbent LECs. Certainly, the Commission should not allow the incumbent LECs to gain additional deregulation for facilities used to serve enterprise customers in the name of "mass market" deregulation of new-build, MPD loop facilities.

If the Commission decides, nonetheless, to grant the incumbent LECs additional relief, it must ensure that this deregulation is appropriately, narrowly tailored to achieve BellSouth's purported aims, by adopting the limitations set forth herein.

Respectfully submitted,

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